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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: JUL 16 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The director reopened the matter on the petitioner's motion, and again denied the petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a Swahili teacher/instructor. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO withdrew the former finding but affirmed the latter.

On motion, the petitioner submits a brief and copies of documents, most of them previously submitted, relating to his education.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

At issue on motion are two issues: whether the petitioner qualifies as a member of the professions holding an advanced degree, and whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on July 1, 2008. After issuing a request for evidence (RFE) on May 18, 2009, and receiving a response from the petitioner, the director denied the petition on October 22, 2009. The petitioner filed a motion to reopen the petition on November 18, 2009. The director granted the motion and affirmed the denial of the decision on February 3, 2010. The petitioner appealed that decision to the AAO, which dismissed the petitioner's appeal on May 9, 2011. It is that AAO decision that is now before the AAO on a motion to reconsider.

The first issue on motion concerns the beneficiary's education. The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines an "advanced degree" as "any United States academic or professional degree

or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." The regulation at 8 C.F.R. § 204.5(k)(3)(i) requires the petitioner to submit either (A) an official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree, or (B) an official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The director, in denying the petition, stated "the petitioner holds the requisite advanced degree" but discussed the issue no further. The AAO, in its May 2011 dismissal notice, found that the petitioner had documented a foreign baccalaureate degree, but had not submitted the required evidence of an advanced degree or its defined equivalent.

The petitioner's motion includes documentation showing that Michigan State University awarded the petitioner "the Degree of Educational Specialist" (a degree between a master's and a doctorate) in December 2007. Ordinarily the AAO would not accept this document on motion, because the petitioner earned the degree before the filing date and could have submitted it earlier. Nevertheless, the AAO's May 2011 dismissal notice was the first notice that the petitioner received that the record was deficient in this regard. The issue did not surface in the May 2009 RFE, and the director's October 2009 denial indicated that the petitioner's evidence was sufficient in that regard. The issue did not surface in the director's February 2010 decision. The petitioner, on motion, asserts that he would have submitted this documentation upon request, and there is no reason to doubt him on this point. Therefore, the current motion represents the petitioner's first opportunity to address a deficiency that had only recently come to his attention.

The AAO withdraws its prior finding that the petitioner has not shown that he qualifies for classification as a member of the professions holding an advanced degree. There remains, however, the original basis for denial of the petition, regarding the petitioner's application for the national interest waiver of the statutory job offer requirement.

Unlike the matter of the petitioner's advanced degree, the petitioner had received prior notice of the deficiencies in his waiver claim, and therefore consideration at this late stage is limited to the petitioner's claims regarding legal deficiencies in the AAO's dismissal order. *See* 8 C.F.R. § 103.5(a)(3). The petitioner submits no further evidence relating to the waiver, and the AAO would not accept any such evidence in support of a motion to reconsider. While the AAO has *de novo* authority on appeal,[1] a motion on the AAO's own prior appellate decision does not trigger a top-to-bottom review of the entire procedural history of the waiver application.

On motion, the petitioner (referring to himself in the third person) states that he

> is seeking reconsideration . . . because of the following:

[1] *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

1) The questions that the petitioner had already answered and already established by the Service have been asked repeatedly.
2) The precedent decisions applied in arriving at decision.
3) Employment at Kansas State University that was initially ignored should be used as part of relevant factual circumstances that could not have been presented at the time of initial filing.

With respect to the first issue identified above, the petitioner protests that "he has been receiving general requests for information that he believes he has already submitted." The petitioner states that, following the RFE, he established that his "services can be characterized as national in scope." The petitioner quotes from the *NYSDOT* precedent decision:

> . . . pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217 n.3. The AAO, in its dismissal notice, stated:

> The argument that teaching Swahili serves the national interest goes to the substantial intrinsic merit of the petitioner's work, not whether a single teacher provides benefits that are national in scope. While the petitioner's students may come from various locations, it remains that the impact of a single teacher is so attenuated at the national level as to be negligible.
>
> It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. In the director's final decision, she stated that the petitioner had not established his influence on the field of foreign language education. On appeal, the petitioner states: "if the petitioner's proposed employment is an area of substantial merit and that the benefit will be national in scope, then the petitioner's influence cannot be limited to 'the walls of the schools where he has worked.'" The petitioner misunderstands the final issue set forth in *NYSDOT,* 22 I&N Dec. at 218-23. Even if the AAO agreed with the director that the *proposed* benefits are national in scope, simply working in an occupation where the benefits can be national in scope does not create a presumption that the petitioner has a "past history of demonstrable achievement with some degree of influence on the field as a whole." *See id.* at 219, n.6.

The petitioner contends that, under the above reasoning, "no individual will be eligible to qualify to be given the NIW visa," because the impact of a single individual cannot match the impact of an entire organization. The petitioner, however, has taken part of the *NYSDOT* decision out of context. The precedent decision does not state or imply that "no individual" qualifies for the national interest waiver (abbreviated "NIW" by the petitioner). Rather, *NYSDOT* indicates that certain occupations lack national scope because, even if an overall field has national reach, the efforts of individual workers in some fields have only local impact. The work of a scientific researcher, for instance, can affect the course of medical or technological development. A single performing artist can entertain audiences nationwide and influence many other performers. An entrepreneur can introduce popular new products and sell them across the country. Other occupations, however, may have substantial intrinsic merit but lack national scope. For instance, the work of a paramedic in a given city, while clearly important locally, does not affect the practice of emergency medicine in other cities or states.

The petitioner asks: "Does it mean then that no teacher has ever qualified or will ever qualify for NIW?" Elsewhere in the same motion, the petitioner acknowledges that USCIS and the AAO considers each waiver application individually, on a case-by-case basis. Nevertheless, as a general rule, classroom instruction is limited in scope because only those in the classroom receive instruction. A given teacher's students make up a negligible fraction of the overall population, and therefore teaching duties are not inherently national in scope. Other factors may come into play – a college professor may engage in research apart from teaching duties, or an instructor may develop an influential new curriculum that others adopt on a national level – but the petitioner has not shown that any such circumstances apply in this case.

The petitioner asserts that a teacher at a college or university "encounters students from different backgrounds" who disperse after graduation and "in turn transmit[] knowledge." The petitioner also observes that language skills have national security applications. These assertions speak to the intrinsic merit of the petitioner's occupation, not to the scope or impact of one individual worker in that occupation. The work of the nation's teachers obviously has a vital cumulative effect, but it does not follow that any one given teacher played an especially significant role in achieving that effect. There is not, as the petitioner suggests, an ironclad bar against granting the waiver to teachers, but there is no presumption of eligibility and it is the petitioner's responsibility to establish national scope. The substantial intrinsic merit of teaching – which exists in unquestioned abundance – does not imply national scope.

The petitioner protests that the director, in "the denial decision dated February 3, 2010," failed to give due weight to the petitioner's employment [redacted] The present motion applies only to the most recent decision. The motion under consideration by the AAO regards the AAO's May 2011 decision, not the director's February 2010 decision. The petitioner, in appealing the director's February 2010 decision, did not raise this issue. The newly claimed flaw in the February 2010 decision is not valid grounds for reconsideration of the AAO's later dismissal of the petitioner's appeal.

When an appellant fails to offer argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2. (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d

1343, 1344 (11th Cir. 1998). *See also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff abandoned his claims as he failed to raise them on appeal to the AAO). The petitioner's appeal of the director's February 2010 decision did not challenge the director's (proper) refusal to consider new employment. Therefore, the petitioner abandoned that issue.

Even if the petitioner had not abandoned the issue in his earlier appeal, the AAO, in its prior dismissal notice, has already advised the petitioner that he must establish eligibility as of the filing date. The petitioner did not begin working [redacted] until January 2010, a year and a half after the petitioner filed the Form I-140 petition in July 2008. This is not a matter of "shifting goalposts," as the petitioner alleges on motion. It is, rather, a binding regulatory requirement at 8 C.F.R. § 103.2(b)(1). The AAO, like the director before it, also previously cited an equally binding precedent decision that indicated that an ineligible petitioner cannot file a premature petition on the expectation of future eligibility, under circumstances that did not exist at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner contends that, by citing [redacted] the director effectively acknowledged that the petitioner's teaching position at [redacted] "demonstrated that he was eligible for NIW." The director made no such finding. Rather, the director quoted the precedent decision to make the point that, even if the petitioner's new employment established eligibility, that fact did not exist at the time of filing and could not retroactively establish eligibility as of the filing date. It is not, in any way, a stipulation that the petitioner's latest employment proves his eligibility or a promise that USCIS will approve a future petition filed after January 2010.

The petitioner states that he "believes that he was qualified at the time of filing," and that his new employment should "be considered as relevant changed factual circumstances that could not have been presented at the initial filing." The regulation at 8 C.F.R. § 103.2(b)(1) does indicate that the petitioner "must continue to be eligible through adjudication" of the petition. In this limited respect, the petitioner's subsequent employment is relevant. If the petitioner had changed occupations entirely in 2010, then his intent to continue teaching would obviously fall into question. In this respect, the petitioner's employment at Kansas State University is consistent with an intention to continue teaching. That intention, however, was never in question in this proceeding.

A motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The petitioner has not established that the AAO's decision was incorrect at the time of its decision. Therefore, the petitioner's motion does not meet the applicable requirements of a motion to reconsider, and must be dismissed.

ORDER: The motion is dismissed.